No. 13-1352

In the Supreme Court of the United States

STATE OF OHIO, PETITIONER

v.

DARIUS CLARK

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause.

2. Whether a small child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

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INTEREST OF THE UNITED STATES

This case presents the question whether statements made by a child to an individual with a duty to report suspected child abuse to a children's services agency or police constitute "testimonial" statements, within the meaning of the Confrontation Clause as interpreted in *Crawford* v. *Washington*, 541 U.S. 36 (2004). That question has substantial implications for the conduct of federal criminal trials, particularly with respect to the District of Columbia, federal territories, and the military, where the United States prosecutes many cases involving child abuse. The United States accordingly has a significant interest in this case.

STATEMENT

An Ohio grand jury charged respondent with felonious assault, endangering children, and domestic

violence arising from the physical abuse of his girlfriend's small children, L.P. and A.T. Following a jury trial at which the prosecution introduced several out-of-court statements made by L.P., including statements to his day care teachers identifying respondent as his abuser, respondent was convicted and sentenced to 28 years in prison. Pet. App. 3a-5a. The Ohio court of appeals reversed, holding that the introduction of several of L.P.'s out-of-court statements violated the Confrontation Clause, and it remanded the case for a new trial. *Id.* at 51a-73a. The Ohio Supreme Court affirmed, holding that the admission of L.P.'s statements to his day care teachers violated respondent's Confrontation Clause rights. *Id.* at 1a-48a.

1. On March 17, 2010, respondent, whose nickname is "Dee," dropped off L.P., the three-year-old son of his girlfriend, at the William Patrick Day Head Start Center in Cleveland, Ohio. Pet. App. 3a, 53a. One of the teachers, Ramona Whitley, noticed in the lunchroom that L.P.'s left eye appeared bloodshot or bloodstained. *Id.* at 3a. Whitley asked, "What happened?" J.A. 27. L.P. responded that he "fell." Whitley asked how he fell and hurt his face, and L.P. again stated, "I fell down." *Ibid.*

When L.P. entered a classroom, the brighter light revealed additional injuries, specifically red welts on L.P.'s face as if he had been whipped. Pet. App. 4a. Whitley alerted the lead teacher, Debra Jones, who observed L.P.'s bloodshot or bloodstained eye and "redness" around his neck. J.A. 58. Jones asked L.P., "[w]ho did this?" and "[w]hat happened to you?" J.A. 59. According to Jones, L.P "seemed kind of bewildered" and "said something like Dee, Dee." *Ibid.*

Jones asked if Dee was "big or little," gesturing with her hands to indicate height. J.A. 60. L.P. eventually responded, "Dee is big." J.A. 64. Jones later testified that she "asked him was he big or little, because I wanted to know was he talking about another child, because sometimes they'll say a brother or sister hit him." J.A. 60; see J.A. 64 (indicating that Jones did not know if "Dee" was a child or a "grownup").

Jones took L.P. to the office of her supervisor, Ms. Cooper, where Jones asked L.P. additional questions to understand the cause of L.P.'s injuries. Cooper raised L.P.'s shirt and observed red marks on his body. J.A. 65. At this point, Cooper determined that they "saw enough to make the call" and directed Whitley, who was the first to observe L.P.'s injuries, to contact the county's social service agency (the Cuyahoga County Department of Child and Family Services) by calling "696-KIDS." J.A. 65-66. That same day, a county social worker arrived at the school and interviewed L.P. Shortly thereafter, respondent arrived, denied responsibility for L.P.'s injuries, and, over the social worker's objections, took L.P. away. Pet. App. 4a; J.A. 149-152.

The next day, a second social worker located L.P. and his younger sister, A.T., at respondent's mother's house. J.A. 92-100. The social worker confirmed L.P.'s injuries and discovered additional evidence of abuse and neglect of L.P., as well as serious injuries, including burns and bruises, on A.T. J.A. 100-103. The social worker notified police, and an ambulance was called to transport the children to the hospital. J.A. 103-105. As the police and ambulance were arriving on the scene, the social worker asked L.P. questions to determine who caused the injuries, and L.P.

indicated that "Daddy" or "Dee" was responsible. J.A. 127-129. Later, a police detective showed L.P. a picture of respondent, and L.P. identified him as "Dee." J.A. 130.

At the hospital, the examining physician determined that L.P. had bruises and abrasions consistent with having been whipped with a belt. A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline consistent with braids being ripped off her head. Pet. App. 4a-5a, 53a.

2. A grand jury charged respondent with five counts of felonious assault (one relating to L.P. and four relating to A.T.), two counts of endangering children, and two counts of domestic violence. Pet. App. 5a. Before trial, the trial court examined L.P. and concluded that he was incompetent to testify because of his young age and his demeanor during the examination. J.A. 12; see also Ohio Evid. R. 601(A). Respondent then sought to exclude L.P.'s out-of-court statements identifying him as the abuser, arguing that their admission would violate his Confrontation Clause rights. J.A. 13. The trial court denied respondent's motion, finding that L.P.'s statements to the day care teachers and the other witnesses satisfied Ohio Rule of Evidence 807, which lifts the hearsay bar for a child's reliable statements concerning physical acts of violence against the child, and holding that admission of the statements would not violate the Confrontation Clause as construed in *Crawford* v. *Washington*, 541 U.S. 36 (2004). J.A. 20-22.

At trial, Whitley and Jones testified to L.P.'s statements at the day care. J.A. 25-86. In addition, the two social workers, a police officer who interviewed L.P. at the hospital, and two of L.P.'s family

members testified that L.P made out-of-court statements identifying his abuser as "Dee." Pet. App. 5a. The jury found respondent guilty on all charges except one felonious assault count relating to A.T. *Ibid.* The trial court sentenced respondent to 28 years of imprisonment. *Ibid.*

3. On appeal, the Ohio court of appeals reversed respondent's convictions and remanded the case for a new trial. Pet. App. 51a-73a. The court held that the testimony of five witnesses—the two teachers, the two social workers, and the police officer—about L.P.'s out-of-court statements violated the Confrontation Clause. *Id.* at 55a-63a. Focusing on the teachers specifically, the court "conclude[d] that L.P's statements to Whitley and Jones were testimonial" and subject to exclusion because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." *Id.* at 63a. The court cited testimony from the teachers acknowledging their obligation under state law to report suspected child abuse.[1] *Ibid.*

4. The State appealed to the Ohio Supreme Court on whether the admission of L.P.'s out-of-court statements to the day care teachers violated respondent's Confrontation Clause rights.[2] A divided Ohio Supreme Court affirmed. Pet. App. 1a-48a.

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[1] The appellate court further held that L.P.'s out-of-court statements to his two family members were inadmissible under Ohio's hearsay rules. Pet. App. 66a-67a.

[2] The State did not appeal to the Ohio Supreme Court the appellate court's decision that the testimony from the social workers and the police officer violated the Confrontation Clause. Pet. App. 6a.

a. Because the day care teachers, Whitley and Jones, had a mandatory duty under Ohio law to report suspected child abuse to a children's services agency or to law enforcement, see Ohio Rev. Code. Ann. § 2151.421 (LexisNexis 2011); Pet. App. 6a-9a, the court held that a teacher in Ohio "acts * * * as both an instructor and as an agent of the state for law-enforcement purposes," in "questioning a child about suspected abuse." Pet. App. 15a. The court therefore applied a Confrontation Clause analysis that asked whether the primary purpose of the statements was to assist in addressing an ongoing emergency or to obtain emergency medical care, or, instead had the primary purpose of "establishing past events potentially relevant to later criminal prosecution." *Id.* at 15a-16a.

The court concluded that because "no ongoing emergency existed, nor had L.P. complained about his injuries or needed emergency medical care," Pet. App. 15a, the teachers had embarked on "an information-seeking process to determine what had occurred in the past and who had perpetrated the abuse," *id.* at 16a. According to the court, "the nature and focus of the [teachers'] questions" "indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." *Id.* at 15a-16a. The court therefore held that L.P.'s responses were "testimonial" and barred by the Confrontation Clause. *Id.* at 16a.

b. Three justices dissented. Pet. App. 18a-47a. The dissent observed that in *Davis* v. *Washington,* 547 U.S. 813 (2006), and *Michigan* v. *Bryant*, 131 S. Ct. 1143 (2011), this Court addressed statements made during police interrogations and had reserved "whether and when statements made to someone

other than law enforcement personnel are 'testimonial.'" Pet. App. 24a (quoting *Davis*, 547 U.S. at 823 n.2). With respect to non-law-enforcement statements, the dissent noted, the Ohio courts have asked whether "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." *Id.* at 26a (citing *State* v. *Stahl*, 855 N.E. 2d 834, 844 (Ohio 2006)).

The dissent rejected the court's view that L.P.'s teachers functioned as agents of law enforcement. The dissent explained that Whitley and Jones were employed by a non-profit Head Start program and found "absolutely no indication that these teachers questioned L.P. for law enforcement." Pet. App. 30a-31a. The dissent disagreed with the assertion that Ohio's mandatory-reporting law effectively "deputize[d] [the teachers] as agents of law enforcement," particularly since the statute "does not impose a duty to ask any questions about suspicious injuries or conditions or to undertake any investigation." *Id.* at 35a. In the dissent's view, a teacher's decision to ask about a student's bruise or black eye "stems not from the statutory duty to report child abuse or neglect," but "from a professional responsibility or concern for the child." *Id.* at 36a. Directing teachers to report suspicions of abuse, the dissent reasoned, "does not change the primary purpose of the[ir] * * * interaction with children." *Id.* at 35a.

The dissent concluded that, in this case, "Whitley and Jones questioned L.P. to protect him and to maintain a safe and structured classroom, not to create evidence for use at [respondent's] trial." Pet. App. 39a-40a. The dissent noted that the teachers' initial "informal and spontaneous" questioning occurred in a

classroom, alongside other students, and the teachers expressed concern that another student had caused L.P.'s injuries. *Id.* at 40a. As soon as L.P. indicated that "Dee" was "big," the dissent pointed out, the teachers stopped their questions, brought L.P. to a supervisor's office, and notified authorities. *Id.* at 41a. These actions, the dissent found, were done not for any prosecutorial purpose, but to "protect L.P. at that moment." *Id.* at 42a.

SUMMARY OF ARGUMENT

L.P.'s statements to his day care providers were not "testimonial" statements covered by the Confrontation Clause. Rather, those statements had the primary purpose of informing L.P's teachers about the source of L.P.'s injuries that the teachers observed at school. The statements of the three-year-old L.P. were not made with a primary purpose of aiding law enforcement or substituting for trial testimony.

I. The Ohio Supreme Court incorrectly categorized L.P.'s day care teachers as agents of law enforcement because of their duty to report suspected abuse or neglect to the county social service agency or to police. The teachers were far removed from any contact with police, and the mandatory reporting duty did not transform them into law enforcement agents for purposes of the Confrontation Clause. Unlike police, civilians, like the teachers here, do not have a professional duty to investigate crime; nor do they typically act with the primary purpose of gathering evidence for a criminal trial. A statement made to a civilian, without police participation, is therefore unlikely to fall within the Confrontation Clause's concern.

II. The Ohio Supreme Court made two errors in its Confrontation Clause analysis. First, by mischarac-

terizing the teachers as police agents, the Ohio Supreme Court ignored the teachers' obvious protective purpose in asking L.P. about the cause of his injuries. The Ohio Supreme Court dismissed the teachers' urgent need to determine whether L.P. would be endangered if released to respondent's custody at the end of the school day. That pressing purpose distinguishes a caregiver's inquiry into possible child abuse from police questioning of adult victims. The nontestimonial character of L.P.'s statements was further demonstrated by the classroom setting and the fluid and informal nature of the questions and answers.

Second, the Ohio Supreme Court omitted any evaluation of L.P's primary purpose, and by ignoring the declarant, the court failed to conduct a key component of the Confrontation Clause inquiry. In so doing, the court gave no consideration to the fact that L.P. was only three years old. A child declarant's age is an objective circumstance that is relevant, if not critical, to determining whether his statement is testimonial. Because a very young child in L.P.'s position would not have understood the future consequences of his statements to his day care teachers, much less have anticipated their use in a criminal proceeding, and because nothing in the questioning suggests a police effort to generate testimony, his statements should not be deemed testimonial.

ARGUMENT

THE CONFRONTATION CLAUSE PERMITS USE OF THE CHILD VICTIM'S STATEMENTS TO HIS DAY CARE TEACHERS IDENTIFYING HIS ABUSER

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted

with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court held that the Sixth Amendment generally forbids introduction of "testimonial" statements of an absent person at a criminal trial unless the person was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Id.* at 51, 53-54, 68.

The Ohio Supreme Court held the statements of a three-year-old victim of abuse, L.P., to his day care teachers were "testimonial" based on two erroneous propositions: first, that Ohio's mandatory reporting statute transformed the day care teachers into "agents of the state for law-enforcement purposes," because the law imposes a duty to report "actual or suspected child abuse or neglect" on teachers (among others); Pet. App. 6a, 15a-16a; Ohio Rev. Code Ann. § 2151.421 (LexisNexis 2011); and, second, that the purpose of the teachers' questions was to ferret out facts concerning criminal liability and the person responsible for it. The court was mistaken: the existence of a reporting duty did not make the day care teachers agents of law enforcement, and in light of all of the circumstances, L.P.'s statements were made primarily to address pressing and immediate health and welfare concerns, not to provide evidence for purposes of prosecution.

I. DAY CARE TEACHERS DO NOT ACT AS AGENTS OF LAW ENFORCEMENT BY VIRTUE OF A MANDATORY REPORTING STATUTE

A. The Confrontation Clause Generally Bars Hearsay From A Non-Testifying Person Whose Primary Purpose Was To Generate Testimony

This Court in *Crawford* did not comprehensively define the scope of "testimonial" statements, but it noted that the term applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," which are "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." 541 U.S. at 68; see also *id.* at 51 (noting that "'[t]estimony,' is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact'") (second set of brackets in original) (quoting 2 Noah Webster, *An American Dictionary of the English Language* 91 (1828)). In cases since *Crawford*, this Court has generally addressed whether an out-of-court statement is "testimonial" by asking whether the "primary purpose" of the statement was to "create a record for trial." *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

In *Davis* and a consolidated case, *Hammon* v. *Indiana*, this Court considered whether statements to law enforcement—during a 911 call and at the scene of a domestic assault, respectively—were testimonial. The Court asked whether the statement's purpose was "to enable police assistance to meet an ongoing emergency," 547 U.S. at 822, as opposed to being a mere "substitute for live testimony," *id.* at 830, and it held that the 911 caller's report on immediate events was

non-testimonial, while the police-elicited statement about past conduct by a domestic-assault victim was testimonial, *id.* at 828-832.

Applying a primary-purpose analysis, *Bryant* held that a shooting victim's statements to police identifying his assailant were nontestimonial, because, among other reasons, they were made in response to questions during an ongoing emergency. 131 S. Ct. at 1162-1167. *Bryant* confirmed that the "primary purpose" of statements is determined by "objectively evaluat[ing] the circumstances in which the encounter occurs and the statements and actions of the parties," *id.* at 1156, including "the declarant and the interrogator," the "contents of both the questions and the answers," *id.* at 1160-1161, and other circumstances that would objectively reveal the purpose of the declaration, *id.* at 1156, 1161.

B. The Primary Purpose Test Applies To Statements Made To A Civilian, But Absent Police Participation, Such Statements Typically Will Not Raise Confrontation Clause Concerns

Crawford, *Bryant*, *Davis*, and *Hammon* each involved statements made in response to police questioning and therefore did not resolve "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Bryant*, 131 S. Ct. at 1155 n.3 (citation omitted); *Davis*, 547 U.S. at 823 n.2; *Crawford*, 541 U.S. at 38-40, 65-66. In analyzing statements to civilians, the primary-purpose test performs the same function in identifying statements that are intended to substitute for in-court testimony, and thus constitute "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (brackets in

original) (citation omitted). But the critical distinctions between a police interrogator and an interested civilian suggest that statements to non-law enforcement will typically be nontestimonial.

The Confrontation Clause "reflects an especially acute concern with a specific type of out-of-court statement": "a formal statement to government officers" with an "essentially investigative [or] prosecutorial function." *Crawford*, 541 U.S. at 51, 53. The Clause was a reaction to the use of *ex parte* examinations by magistrates under the Marian statutes, *id.* at 50, and the "unique potential for prosecutorial abuse" when "government officers" are involved in "the production of testimony with an eye toward trial," *id.* at 56 n.7. Although the Marian statutes exemplified the "principal evil" targeted by the Confrontation Clause, *id.* at 50, it is difficult to say that *all* statements to non-law enforcement personnel are automatically exempt from Confrontation Clause review. If a declarant uses a civilian solely as a conduit to communicate with the police, or the police enlist a civilian as a surrogate to generate witness statements primarily to further a criminal investigation, the Confrontation Clause may well apply. Cf. Pet. Br. 45-46 (noting that those contexts are not involved in this case).

But a teacher, doctor, nurse, day-care employee, or caregiver performing her ordinary role does not implicate any such concerns. A civilian, like the teachers here, with no connection to law enforcement, typically approaches an injured victim as a Samaritan seeking to assist, not as a Marian inquisitor, a police officer, or a prosecutor in pursuit of evidence. *Bryant*, 131 S. Ct. at 1155. Civilians will have a wide range of reasons for conversation and inquiry, and they are not charged

with a professional duty to gather evidence for criminal prosecutions. Nor would a victim mistake a civilian, like the day care teachers here, for law enforcement. Cf. *Crawford,* 541 U.S. at 58 (noting that *Bourjaily* v. *United States*, 483 U.S. 171, 173-174 (1987), "hew[ed] closely" to the testimonial line by admitting statements made "unwittingly" to an undercover informant, where the declarant was not made aware that the statement was being sought for use at trial).

By contrast, law enforcement officers have criminal investigation among their primary duties, such that statements made to police are often testimonial. See *Davis*, 547 U.S. at 831 n.5 (noting that "examining police officers * * * perform investigative and testimonial functions once performed by examining Marian magistrates") (citation omitted). Of course, the police have other functions as well, and statements elicited by the police in response to an emergency, as well as in other settings, may reflect paramount purposes other than gathering or preserving testimonial evidence. See *Bryant,* 131 S. Ct. at 1155 ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."). But those "other circumstances" are the typical situation for a civilian whose primary role is not law enforcement.

The primary purpose test therefore accounts for the key distinctions between police, whose prime objective is typically the investigation and prosecution of crime, and others, who generally inquire for reasons unrelated to the prosecutorial process. Under that legal standard, the "primary purpose" of civilian inquiry is ordinarily not to generate evidence but to

serve other purposes, and the resulting statements to civilians will typically be nontestimonial.

C. The Ohio Mandatory Reporting Statute Does Not Transform Civilians Into State Actors

The Ohio mandatory reporting statute does not change the analysis.

1. The Ohio Supreme Court acknowledged that, as with other state mandatory child abuse reporting schemes, the "primary purpose" of Ohio's reporting duty is to "facilitate the protection of abused and neglected children, *rather than to punish those who maltreat* them," Pet. App. 7a-8a (emphasis added) (quoting *Yates* v. *Mansfield Bd. of Educ.*, 808 N.E. 2d. 861, 865 (Ohio 2004)).[3] That protective purpose is also demonstrated by the operation of the Ohio reporting statute, which provides that a report of abuse may be made *either* to a children services agency (as the day care teachers did here), *or* to a peace officer, and which assigns the social service agency, rather than police, primary investigation authority.[4] Ohio Rev.

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[3] See Amicus Curiae Pet. Stage Br. of Am. Prof'l Soc'y on the Abuse of Children 7-8 & n.4 (listing state reporting statutes and explaining that they emphasize "the need for child protection and rehabilitation of the family, rather than the potential prosecution and punishment of the abusers").

[4] Even if a report of suspected abuse or neglect were made to a peace officer, the statute directs that officer to "refer the report to the appropriate public children services agency," Ohio Rev. Code. Ann. § 2151.421(D)(1) (LexisNexis 2011). While the statute requires the social service agency to conduct its investigation in "cooperation with the law enforcement agency," *id.* § 2151.421(F)(1), the coordination is to be made with the "primary goals" of "the elimination of all unnecessary interviews of children" or "when feasible, providing for only one interview of a child," *id.*

Code Ann. § 2151.421(A)(1)(a) (LexisNexis 2011). The Ohio Supreme Court incorrectly concluded that, irrespective of those statutory priorities, mandatory reporters, such as the teachers here, necessarily serve in a "dual capacity": as an "instructor[]" and as an "agent of the state for purposes of law enforcement." Pet. App. 3a.

Significantly, the Ohio statute does not vest mandatory reporters with any duty (or authority) to investigate on behalf of the State. Rather it imposes only a limited duty to report observed facts giving rise to a suspicion of abuse or neglect. Ohio Rev. Code Ann. § 2151.421(F)(1) (LexisNexis 2011). Such a reporting duty does not convert a private party into an agent of the State.

2. The conclusion that day care teachers do not become agents of law enforcement by virtue of a reporting duty accords with this Court's analysis of state action in other contexts. In no other constitutional context has such a limited reporting duty transformed a private party into an agent of law enforcement.

In the Fourth Amendment context, for example, this Court has distinguished between reporting duties and an affirmative obligation to conduct an investigation on behalf of police. In *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), this Court contrasted a state hospital employee's "duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment"—which does not implicate Fourth Amendment concerns—with those employees' active efforts "to obtain such evidence from their patients for the specific pur-

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§ 2151(J)(2); rather than with the specific goal of facilitating criminal prosecutions.

pose of incriminating those patients," which does. *Id.* at 84-85 (emphasis omitted); see also *id.* at 78 n.13 (expressly distinguishing state mandatory duty to report child abuse from other situations where the "hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes").

To take another example, in evaluating searches by private parties, courts have held that only where the private party acts as an "agent or instrument of the state," by virtue of the government's active role in instigating or conducting a search, does the Fourth Amendment apply.[5] *United States* v. *Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976) (en banc) (Kennedy, J.); see, *e.g.*, *United States* v. *Jarrett*, 338 F.3d 339, 346 (4th Cir. 2003) ("[T]here must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional."), cert. denied, 540 U.S. 1185 (2004); *United States* v. *Smythe*, 84 F.3d 1240, 1242 (10th Cir. 1996) (holding private actor is not an agent of the state unless "the government coerces, dominates or

[5] Some courts have also asked whether the private party's primary aim in conducting the search was to assist the government, rather than to "serve his own interests." *United States* v. *Cameron*, 699 F.3d 621, 637 (1st Cir. 2012) (holding that Yahoo!, a private Internet Service Provider, did not act as government agent by scanning its customers' accounts for child pornography because it acted pursuant to its own internal policy), cert. denied, 133 S. Ct. 1845 (2013); see also *United States* v. *Walther*, 652 F.2d 788, 792 (9th Cir. 1981) ("The presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search has been held insufficient to implicate [F]ourth [A]mendment interests, especially where the private party has had a legitimate independent motivation for conducting the search.").

directs" his actions in conducting the search) (citation omitted); cf. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-615 (1989) (whether the requisite agency relationship exists "necessarily turns on the degree of the Government's participation in the private party's activities").

And in determining whether the government's use of a private party violated a defendant's Sixth Amendment right to counsel, this Court has distinguished between an informant who serves as a mere "listening post" and one who is directed to actively elicit information from a represented defendant. As this Court stated in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986), "a defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Id.* at 459. Rather, this Court held such a violation is established only where "the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Ibid.*

The Ohio reporting statute required the day care teachers to report what they learned in the course of their "routine" responsibilities to care for their young students, *Ferguson*, 532 U.S. at 84-85, akin to serving as "listening post[s]," *Wilson,* 477 U.S. at 456 n.19 (citation omitted). They were not required to investigate on the State's behalf. To the extent that the teachers asked questions, they acted from professional obligation and private concern, rather than at the

command and direction of the State. The Confrontation Clause does not equate them with the police.[6]

3. As the dissent below observed, all States have enacted a mandatory reporting requirement for child abuse and neglect, and 18 States and Puerto Rico require *all* adults to report physical or sexual abuse of vulnerable populations such as children, individuals with disabilities, or the elderly. See Pet. App. 38a n.4; see also Child Welfare Info. Gateway, U.S. Dep't Health & Human Servs., *Mandatory Reporters of Child Abuse and Neglect* (Nov. 2013) (summarizing state reporting duties).[7] Yet, the Ohio Supreme Court decision stands virtually alone in finding the teachers acted as law enforcement agents in the absence of *any* police involvement in the questioning and solely by virtue of their reporting duty. See Pet. App. 37a-38a (O'Connor, C.J., dissenting) (citing cases); *id.* at 37a ("It does not appear that any court has held that a mandatory reporter is an agent of law enforcement when, as here, there is no police involvement in the interview."); *People* v. *Phillips*, 315 P.3d 136, 165 (Colo. App. 2012) ("Courts in other jurisdictions, however, have held that the mere fact of a declarant making a hearsay statement to a statutorily defined mandatory reporter does not make the statement testimonial."), cert. denied, No. 12SC952, 2013 WL 5308307 (Colo. Sept. 23, 2013), cert. denied, 134 S. Ct. 1325

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[6] That treatment of reporting obligations is consistent with historical practice. At common law, every person had "a duty to raise the 'hue and cry' and report felonies to the authorities." *Branzburg* v. *Hayes*, 408 U.S. 665, 696 (1972). But that duty did not transform everyday citizens into police actors.

[7] https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.

(2014).[8] That position is correct: the Ohio Supreme Court erred by treating Whitley and Jones as law enforcement agents when conducting the Confrontation Clause analysis.

D. The Day Care Teachers In This Case Did Not Act As Agents Of Law Enforcement In Questioning L.P.

Stripping away the incorrect legal conclusion that the Ohio Supreme Court drew from the reporting statute, it is clear that Jones and Whitley did not act at the behest of law enforcement. The police were not aware of L.P.'s arrival at school with a bloodshot eye and red welts on his face, nor did they direct L.P.'s teachers' understandable efforts to find out what happened. No law enforcement officers were even present. Nothing about the questioning itself—which sought to identify the source of L.P.'s injuries—suggested that the statutory duty to report abuse altered the teachers' interaction with their student. Indeed, it was Whitley and Jones's supervisor, Ms. Cooper, who first raised the reporting requirement, and only after L.P. made the relevant declaration—that "Dee" was responsible. J.A. 64-65. Whitley then called the county social service agency's reporting line, "696-KIDS."[9] J.A. 36-37. The police were not

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[8] In *People* v. *Stechly*, 870 N.E.2d 333, 365-367 (Ill. 2007), the court found that the witnesses' "status as mandated reporters" did "buttress" the conclusion that they were "acting as agents of law enforcement" where "their actions appear to have had no other purpose than to obtain information to pass on to the authorities," but the court did "not hold[] that every mandated reporter acts as an agent of law enforcement in every interview."

[9] At respondent's trial, Whitley testified that she understood "696-KIDS" to be "a number you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexual-

summoned until the next day, and then only after a second social worker found L.P. at respondent's mother's home and discovered that L.P. and A.T. had suffered additional, severe injuries, abuse, and neglect. J.A. 91-105. Those facts convincingly demonstrate that the day care teachers were far removed from the prosecutorial enterprise and did not interview L.P. on behalf of police.

II. L.P.'S STATEMENT TO HIS DAY-CARE TEACHERS IDENTIFYING "DEE" AS HIS ABUSER WAS NONTESTIMONIAL

L.P., an abused child, did not provide testimony when he identified his abuser to his teachers. Contrary to the Ohio Supreme Court's conclusion, the teachers acted from their primary duty to protect the health and welfare of a child in their charge. And by focusing exclusively on the teachers' purported motives, the Ohio Supreme Court ignored the declarant, thus failing to determine what, if any, purpose a reasonable child in L.P.'s position would have had in answering his teachers' questions. In particular, the court did not consider that L.P. was only three years old—which suggests he would not have reasonably appreciated future legal consequences of his declaration.

A. The Teachers, As Civilians, Acted Out Of A Protective, Rather Than A Prosecutorial, Motive

By mischaracterizing the day care teachers as agents of law enforcement, the Ohio Supreme Court

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ly abused, there's a number that we call to make sure everything's okay." J.A. 36-37. She further described her understanding of the mandatory reporting duty as requiring her "to report what is going on when it comes to the safety of a child." J.A. 37.

misconstrued the purpose of the teachers' inquiries and wrongly presumed that, if the teachers were not responding to an emergency, they must have had the primary purpose of gathering evidence to support a criminal prosecution. See Pet. App. 15a-16a. That is a false dichotomy. A primary concern for a child's welfare may exist even if a trip to the hospital or separation from an abuser is not immediately necessary. And where the primary purpose is something other than gathering statements for use at a criminal trial, "the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 131 S. Ct. at 1155; *Giles* v. *California*, 554 U.S. 353, 376 (2008) ("Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."). The circumstances of this case objectively show that the day care teachers sought primarily to protect L.P. rather than to gather statements for use at a future criminal trial.

1. When L.P. entered the day care, his teachers assumed a "special responsibility" for his health and well-being. Pet. App. 35a (O'Connor, C.J., dissenting) (quoting *Yates*, 808 N.E.2d at 870). After observing L.P's bloodshot eye and facial welts, his teachers asked "what happened" and "who did this." A reasonable teacher's primary purpose in asking L.P. to identify the source of his injuries was not to "nail down the truth about past criminal events," but to ascertain whether an "immediate threat" existed in the schoolhouse, *Davis*, 547 U.S. at 829-830, to determine whether L.P. had an urgent need for medical care, and

to decide whether he could be returned home at the end of the day.

These initial inquiries therefore were designed to establish that L.P. had not been harmed at the day care and that no immediate threat was posed to his safety or the safety of other children. See J.A. 64 (Jones indicated that she did not know if "Dee" was a child or an adult); see also *Davis*, 547 U.S. at 832 (observing that, even where police are responding to a crime scene, the "initial inquiries," required to "assess the situation" and "possible danger to the potential victim," may "produce nontestimonial statements") (citations omitted). Only once L.P. provided these initial answers—which are the only statements at issue in this case—and observed additional injuries, did the day care teachers develop sufficient suspicion of abuse to call the social services' hotline.

Even where teachers suspect physical abuse at the outset of questioning, they have an immediate protective need to learn who cause it, which the Ohio Supreme Court disregarded. The teachers maintained only temporary custody of the child; absent social services' intervention, L.P. would be (as he was) returned to respondent's custody when the school day ended. Questions like "what happened" and "who did this" therefore allowed the teachers to assess whether the child-victim faced imminent danger when the school bell rang. See *Seely* v. *State*, 282 S.W.3d 778, 789 (Ark.) ("The identity of anyone who may have harmed J.B. was relevant to ensuring her safety after she left the hospital."), cert. denied, 555 U.S. 898 (2008).[10]

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[10] L.P.'s situation illustrates the potential urgency of substantiating suspected child abuse. At the end of L.P.'s school day, re-

The threat to an abused child is distinguishable from *Hammon*, where the victim of domestic violence was an adult and gave her statement to police "at some remove in time from the danger she described." 547 U.S. at 832. The adult victim in *Hammon* had both the legal authority and the physical means to leave her house as soon as the police departed. In stark contrast, at the end of the day, L.P. was returned to the custody of his abuser.

2. The Ohio Supreme Court also failed to properly examine other circumstances that would illuminate whether the "primary purpose" of L.P.'s statements was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. The encounter was spontaneous; the teachers spoke to L.P. in a classroom with other children nearby, and the exchange was brief, "fluid and

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spondent took L.P. from the day care, notwithstanding the fact that a county social worker was at the scene, actively trying to assess L.P.'s situation. J.A. 149-153; see J.A. 150-151 (social worker testified that "[respondent] stepped forward, grabbed the child * * * said he didn't have any time for this * * * . We had, you know, kind of a stare down * * * . I didn't want to get into a physical altercation * * * . [Respondent] proceeded to leave out the door and got straight into his car.").

A second social worker spent that day and the next day searching for L.P., only to discover him and his sister, A.T., at respondent's mother's house suffering from far more severe injuries and neglect than even the day care teachers appreciated. J.A. 92-101. These injuries were so striking that the social worker called for police assistance, and soon after, an ambulance was summoned to remove the children and provide them with immediate medical care. J.A. 101-107.

somewhat confused." *Bryant*, 131 S. Ct. at 1166. The teachers did not solicit details on the chronology of L.P's injuries, cf. *Davis*, 547 U.S. at 820, but only a modicum of information necessary to assess L.P.'s current condition and whether another student had caused his injuries. See *Bryant*, 131 S. Ct. at 1166 (asking victim "'what had happened, who had shot him, and where the shooting occurred' * * * solicited the information necessary to enable [police] 'to meet an ongoing emergency'") (citations omitted).

Significantly, the teachers did not reduce L.P.'s oral statements to a formal, written, or sworn document. Nothing about the interaction was formal—neither the questions nor the responses. Cf. *Bryant*, 131 S. Ct. at 1160, 1166-1167 (formality of statement matters in determining whether it is testimonial); *Davis,* 547 U.S. at 831 n.5 ("We do not dispute that formality is indeed essential to testimonial utterance."); see *id.* at 836-838 (Thomas, J., concurring in the judgment in part and dissenting in part) (a "requirement of solemnity" and formality must exist before interactions with the police implicate the Confrontation Clause, absent prosecutorial evasion); see also *Williams* v. *Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring in the judgment) (same).

The questioning here bears no resemblance to the *ex parte* witness statements condemned in *Crawford*. See *Davis*, 547 U.S. at 830 (describing the statements at issue in *Crawford* and *Hammon* as having "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"). Rather, the circumstances of this case bear all the hallmarks of teachers focused on protecting the health and welfare of their young charge.

B. A Reasonable Child In L.P.'s Position Would Not Have Foreseen That His Statement Would Be Used As Evidence In Future Criminal Proceedings

The Ohio Supreme Court also failed to consider L.P.'s purpose in answering his teachers' questions. See Pet. App. 15a ("[H]is teachers acted to fulfill their duties to report abuse."); *id.* at 16a ("[T]he primary purpose of that inquiry * * * was an information-seeking process to determine what occurred in the past and who had perpetrated the abuse."). Indeed, in deciding whether L.P.'s statement was testimonial, the court gave no consideration to the fact that he was only three years old. A young child's response to his teachers' classroom inquiry is far from the core Confrontation Clause concerns, as it is unlikely that such child would have been capable of understanding the future consequences of his statement, much less contemplate its use in a criminal trial.

1. This Court has emphasized that the *declarant's* purpose—divined from an examination of the actions and statements of all parties—is of paramount importance to the Confrontation Clause analysis. See *Bryant*, 131 S. Ct. at 1161 n.11 ("[I]t is the statements, and not the questions, that must be evaluated under the Sixth Amendment."); see also *id.* at 1169 (Scalia, J., dissenting) ("A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause."). Given the difficulty inherent in discerning a young child's purpose, cf. *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2403 (2011), it is unsurprising that, faced with a child declarant, many courts have focused on the adult interrogator's intent. See, *e.g.*, *In re Rolandis G.*, 902 N.E.2d 600, 610 (Ill. 2008), cert. denied, 556 U.S. 1274

(2009); *State* v. *Bentley*, 739 N.W.2d 296, 300 (Iowa 2007), cert. denied, 552 U.S. 1275 (2008); *People* v. *Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011). But, in keeping with this Court's post-*Crawford* Confrontation Clause jurisprudence, courts must make an objective determination of the child's primary purpose.

This Court has not decided whether and how a child's age factors into an otherwise objective analysis, but it has recognized that courts must evaluate "all of the relevant circumstances" of the declaration, *Bryant*, 131 S. Ct. at 1162, including the declarant's "physical state," *id.* at 1161-1162. See *id.* at 1159 (stating that a victim's medical condition "is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions"). Age is plainly one such circumstance, and it is therefore a relevant, and potentially critical, factor that courts should consider when deciding whether a child's statement is testimonial. See, *e.g.*, *People* v. *Vigil*, 127 P.3d 916, 925 (Colo.) ("[A] person's age is a pertinent characteristic for analysis."), cert. denied, 549 U.S. 842 (2006); *People* v. *Stechly*, 870 N.E.2d 333, 362-363 (Ill. 2007) (Age is "one of the objective circumstances to be taken into account."); *Commonwealth* v. *Allshouse*, 36 A.3d 163, 181 (Pa. 2012) (holding that a child's age is a relevant, albeit not determinative factor in the Confrontation Clause analysis), cert. denied, 133 S. Ct. 2336 (2013); *Lagunas* v. *State*, 187 S.W.3d 503, 519 (Tex. App. 2005) (Declarant's "age [of four years] and her emotional state are factors strongly

suggesting" her statements to a police officer were nontestimonial.).[11]

2. Here, it can hardly be disputed that a three-year-old child in L.P.'s position would not have equated his answers to a solemn declaration of fact, nor would he have foreseen that his statement might be used in a future criminal trial. When a child is so young as to be unable to formulate such a purpose, he is comparable to the injured shooting victim in *Bryant*, whose condition renders his answers "simply reflexive." 131 S. Ct. at 1161. A child's inability to appreciate the potential for his statements to have future consequences for the accused, much less be used in a criminal prosecution, must weigh heavily against a finding that the statement was testimonial. See Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 251-252 (2002) ("With respect to

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[11] Although common law cases varied on whether they would admit a child's out-of-court statements into evidence, practice from the 17th and 18th centuries suggests no blanket prohibition on the admission of a child's hearsay as evidence against a defendant, even where the child was deemed incompetent to testify. See 4 William Blackstone, *Commentaries* *214 (1769); Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-*Davis, 82 Ind. L.J. 1029, 1038, 1052-1053 (2007). The value of historical practice may be limited because child abuse and neglect was rarely prosecuted in or around the time of the Founding and is a more modern development in the law. See Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 13-20 (2000); Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 312 (2005). But no clear common law tradition against use of such statements exists that might inform this Court's elaboration on the testimonial standard.

very young children * * * we should admit their statements for what they are worth, without pretending that the children have the capacity to act like adults.").

In responding to his teachers' questions, L.P. "was not acting as a *witness*"; he "was not *testifying*" against respondent. *Davis*, 547 U.S. at 828. L.P. was instead responding to his teachers' concerns regarding "the existence and magnitude of a continuing threat" to L.P.'s immediate safety and well-being. *Bryant*, 131 S. Ct. at 1159. His responses were not testimonial under *Crawford*.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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